No. 20183

In the

United States Court of Appeals

for the Ninth Circuit

THE TRAVELERS INSURANCE COMPANY
and
THE TRAVELERS INDEMNITY COMPANY,
Appellant,

vs.

REAN WILLIAM McELROY, JR.,
Appellee.

Reply Brief for the Travelers Insurance Company and The Travelers Indemnity Company

---

KRAMER, ROCHE, BURCH & STREICH
567 First National Bank Bldg.
Phoenix, Arizona
Attorneys for Appellant

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

No. 20183

In the

United States Court of Appeals

for the Ninth Circuit

THE TRAVELERS INSURANCE COMPANY
and
THE TRAVELERS INDEMNITY COMPANY,
Appellant,

vs.

REAN WILLIAM MCELROY, JR.,
Appellee.

Reply Brief for the Travelers Insurance Company and The Travelers Indemnity Company

---

PRELIMINARY ARGUMENT

Appellee correctly states that a judgment [by *default*] was taken in the Superior Court of the State of Arizona against Trujeque in the amount of $105,000.00, together with interest, on May 20, 1963.

Further, it is undisputed that Appellee, on December 5, 1963 filed in the District Court for the District of Arizona a complaint in Cause No. 4961 against Travelers Insurance Company. That complaint alleged *inter alia,* as follows:

> "That the aforesaid insurance policy specifically by its terms, permits the plaintiff to bring this action based *on the judgment of the Superior Court of Maricopa County, and enforce the payment to the plaintiff from the named defendants.*" (Emphasis ours.)

Without question the above complaint in the instant case is an action based only upon the final *default* judgment rendered by the Superior Court of the State of Arizona in Cause No. 147641 (T.R. 33).

In view of the above, Appellant's replication will be directed initially to that sound legal principle set forth in Appellant's opening brief which Appellee refused to respond or refer to in his answering brief.

ARGUMENT

As set forth at page 7 of Appellant's opening brief, it cannot be disputed that Jacobs was the owner of the truck-tractor in question. When Appellee (plaintiff below) obtained his *default* judgment against Trujeque, which is the basis of this present action, plaintiff alleged in his complaint as follows: (T.R. 34)

> "That on or about the 23rd day of December, 1962, at approximately 8:40 P.M., defendant MIKE E. TRUJEQUE, was driving a 1957 Freight-Way truck-tractor in a Northerly direction on North 51st Avenue in the City of Phoenix, Arizona; that said truck-tractor was, at said time, *owned by Defendant, DON JACOBS*, and that defendant, MIKE E. TRUJEQUE, was then and there operating said truck-tractor as the agent on behalf and with the consent, permission and authority of the *owner, defendant* DON JACOBS." (Emphasis ours.)

As was set forth at page 7 of Appellant's (Travelers') opening brief:

> "The above allegations by plaintiff in his Complaint filed in the Superior Court of the State of Arizona was the theory under which a judgment in the amount of $105,000.00 was rendered. The fact of ownership became merged in the judgment rendered against Trujeque."

Ownership, Appellee states, must be decided upon the theory of conflict of laws. It seems all to apparent that Appellee wishes to obscure the fact that ownership in this case has already been determined as a matter of law by their own action in obtaining the *default* judgment against Trujeque. Appellee's brief is conspicuously silent as to any argument which would avoid the fact that the *default* judgment obtained by Appellee determined ownership.

Appellee *must* take this inconsistent and untenable position to bring this case within the purview of *Jenkins v. Mayflower Insurance Exchange,* 93 Ariz. 287, 380 P.2d 145. Their analysis is incorrect for they have ignored basic fundamental precepts.

1. A Default Judgment Conclusively Establishes So Far as Subsequent Proceedings on the Judgment Are Concerned, the Truth of All Material Allegations Contained in the Complaint in the First Action and Every Fact Necessary to Uphold the Default Judgment.

A judgment entered by default is just as conclusive upon the issues tendered by the complaint as if rendered after answer filed and a trial. *O'Brien v. Appling,* 283 P.2d 289 (1955); *Fitzgerald v. Herzer,* 177 P.2d 364 (1947); *Brown v. Brown,* 147 P. 1168 (1915); *Maryland Casualty Co. v. O'Meara,* 3 P.2d 46 (1931); *Garcia v. Garcia,* 306 P.2d 80 (1957). Further, it is basic that all well pleaded facts in a complaint are admitted by a default judgment. *Postal Ben. Ins. Co. v. Johnson,* 165 P.2d 173 (1946).

In Arizona there is found a leading case in point, *Collister v. Inter-State Fidelity Building & Loan Assn.*, 38 P.2d 626, wherein the Court stated at page 629:

> "That the judgment was rendered by default does not affect its validity, for such a judgment *admits as true all the material allegations properly set forth in the complaint and is just as binding and conclusive as to them as though it had been rendered after answer and contest.*" (Emphasis ours.)

And, further (at page 629):

> ". . . all matters in issue, or which could have been put in issue . . . were settled by the judgment in that cause."

The courts have expressed the rule in various ways but the basic rule is that a default judgment is just as conclusive an adjudication of the facts and issues that are essential to support the judgment as one entered after actual litigation. *Morris v. Jones*, 329 U.S. 545 (1947); *Glasser v. Wessel*, 152 F.2d 428 (1945); *Re Mercury Engineering, Inc.*, 68 F. Supp. 376 (1946 D.C. Cal.); *Rogers v. Tapo*, 230 P.2d 522 (1951).

It cannot be seriously alleged that a default judgment is not conclusive as to all issues tendered by and properly pleaded in the complaint and as to every issue which properly belonged in the controversy *O'Brien v. Appling, supra; Adamik v. Adamik*, 75 N.Y.S. 2d 824 (1948); *Freeze v. Salot*, 266 P.2d 140 (1954); *Fitzgerald v. Herzer, supra.*

Appellee's original allegation of ownership of the vehicle in Jacobs was essential to the *default* judgment rendered against Trujeque. The fact of ownership in Jacobs was fully adjudicated and determined. The instant case is one based on that default judgment. To permit Appellee to assert ownership in another, in truth impeaches his own

default judgment. Appellee in ignoring the obvious, is on the "horns of a dilemma" for he in effect argues that he can obtain a judgment by default against Trujeque alleging ownership in Jacobs; sue to collect on *that default* judgment against Travelers Insurance Company and allege and vigorously maintain that C & P is now the owner of that same vehicle. A perusal of Appellee's complaint against Trujeque (T.R. 34-36) alleges ownership in Jacobs without equivocation and at *no time* is C & P mentioned either as owner, bailee or lessee of the vehicle in question. Appellee seeks to accomplish the impossible. He seeks on one hand to collect a default judgment from an insurer who entered into a contract with C & P and issued a non-owners policy of insurance [which is permissible in Arizona] for a truck or vehicle actually owned by Jacobs and on the other hand in obtaining that same default judgment he alleged and proved that Jacobs was the actual owner of that vehicle to the exclusion of any other entity. This the Appellee cannot do because the fact of ownership of necessity is merged in the default judgment obtained.

Appellant is astonished that Appellee has taken lightly the doctrines of res judicata and collateral attack. In the trial court on motion for summary judgment Appellee argued and re-argued the theory of permissive use of the vehicle in question by Trujeque. Appellant replied to those arguments. Appellee avoided and sidestepped the true area of dispute and continues to do so. [Appellee seeks to have this Court adopt a hybrid rule to enforce a default judgment conceived and authored by Appellee alone.] That the doctrine of res judicata applies is fundamental. At no time in any proceeding has a determination been made that C & P is the owner of the vehicle in question. In this action for the first time, when C & P is not a party, when the issue of

ownership has been determined in Cause No. 147641, [Maricopa County] on a suit to collect a default judgment does Appellee seek to introduce his new concept of res judicata. He in effect argues that ownership conclusively adjudicated in Jacobs is now by some unknown alchemy ownership in C & P. Or more devastatingly he argues that he can obtain a default judgment against Trujeque for $105,000.00 based on one set of facts and collect on that same judgment under another incompatible set of facts. The doctrine of res judicata precludes the relitigation in the instant case of the issue of ownership because that issue was adjudicated and conclusively determined by the judgment rendered in the Superior Court of Arizona. *Garcia v. Garcia, supra; Bernhard v. Bank of America Nat. Trust & Sav. Assn.,* 122 P.2d 892 (1942); *Day v. Wiswall's Estate,* 381 P.2d 217 (1963).

2. Appellee Is Attacking His Own Judgment by Alleging Ownership in C & P.

In the instant case, the issues determined in the prior action precludes Appellee from arguing the ownership of the truck-tractor in someone other than Jacobs. Appellee by attempting to do so is collaterally attacking his own judgment. An action such as the instant one is an action to obtain a new judgment destroying the judicial findings which resulted in the former judgment. Without question this is a collateral attack and cannot be done. *Cox v. MacKenzie,* 70 Ariz. 308, 219 P.2d 1048 (1950); *Tuba City Min. & Mill Co. v. Otterson,* 16 Ariz. 305, 146 P. 203 (1915); *Shattuck v. Shattuck,* 67 Ariz. 122, 192 P.2d 229 (1948); *Hershey v. Banta,* 55 Ariz. 93, 99 P.2d 81 followed in *Hershey v. Republic Life Ins. Co.,* 55 Ariz. 104, 99 P.2d 85 (1940).

The Arizona Supreme Court has had frequent occasion to determine what constitutes a collateral attack and invariably has found that an attempt to obtain a judgment such

as is sought in this case constitutes a collateral attack upon the prior judgment. In *Tube City Mining & M. Co. v. Otterson, supra*, the Court said of the attack:

> "It is not an attempt to avoid or correct the former judgment in some manner prescribed by the law, *but it is an effort to obtain another and independent judgment* which will destroy the effect of the former judgment. As the present action is a collateral attack on the former judgment, it must be made to appear that such judgment was rendered without jurisdiction and is void." (Emphasis ours.)

Later, in *Henderson v. Towle,* 23 Ariz. 377, 382, 203 P. 1085 (1922) the Court clarified the subject further:

> "As the action is not brought for the sole purpose of impeaching or overturning the former judgment, but has also for its object an independent relief or result, the attack made herein upon the former judgment is a collateral one."

Under the principle of collateral estoppel a judgment *precludes* the relitigation in another action of a specific question litigated and determined by and essential to the first action. This is not a new theory but is well founded in the law. *Cromwell v. Sac County*, 94 U.S. 351 (1877).

3. Conditional Vendee Jacobs Is Owner under Any Interpretation.

Appellee finds solace in the conflict of law theory that the question of ownership must be determined by the law of the State of Arizona and even if determined by the law of the State of Iowa, ownership in this particular instance is in C & P. This argument is completely superfluous because the fact of ownership at this point is undisputed as Appellant has maintained in their opening brief and in this reply brief. Assuming arguendo that the question of ownership can be litigated in this action (which Appellant vehe-

mently denies) then Appellee again is out of step. In Appellant's opening brief we directed the Court's attention to *Ruby v. United Sugar Co. S.A.*, 46 Ariz. 535, 109 P.2d 845 (1941) and to the various code sections of Iowa and again to *Hartman v. Norman*, 253 Iowa 694, 112 N.W.2d 374 (1962) which case construes the Iowa conditional sale statute and the purpose of its enactment.

Appellee should be well aware that public policy would dictate that a conditional vendor retains title only as security for the purchase price and they should have been well acquainted with the recent holding in *Herman v. Anacostia Chrysler-Plymouth, Inc.*, 350 F.2d 781 (1965) (Circuit Court of Appeals for the District of Columbia). In *Herman* the defendant was the seller of a vehicle under a conditional sale contract with the usual reservation of title clause. It was, therefore, alleged in the complaint that this defendant seller was the "owner" at the time of the accident. The Circuit Court of Appeals for the District of Columbia quickly disposed of that issue as follows (at page 783):

> "To the extent reliance is now placed upon a clause in the conditional sales contract which reserved title to the seller, we read the instrument as providing *only a typical means of achieving security for the unpaid balance of the agreed purchase price.*" (Emphasis ours.)

To contend, as Appellee does, that this conditional sales contract places ownership in C & P is to completely ignore the obvious, recognized, common everyday business method of "achieving security for the unpaid balance of the agreed purchase price." Plaintiff in the instant case attempts to use the conditional sales contract as a shield when in the normal course of events public policy dictates that the

conditional sales contract should not shield the person who has the actual control of the automobile in question even though the seller holds title as security for the payment of the purchase price. *Herman* also disposes of Appellee's other contention when he quotes § 28-130, Arizona Revised Statutes, that statute defines "owner". By some verbal gymnastics Appellee tries to construe § 28-130, Arizona Revised Statutes, in favor of Appellee. This code section is identical with the code provision found in *Herman, supra,* and does not by any stretch of the imagination impute ownership in C & P. To the contrary the statute is unambiguous and should be read in its entirety for it gives the conditional vendee (Jacobs) the right to immediate possession and although C & P may have a right to use it under a lease agreement the lease agreement does not control § 28-130, A.R.S. It is but a collateral agreement between C & P and Jacobs.

4. The Jenkins Decision Is Limited to an Owners Policy Because A.R.S. § 28-1170B, the Arizona Financial Responsibility Act, Directs Itself Only to an Owners Policy.

Appellant feels that its argument in its opening brief (pp. 14-19) clearly establishes this principle and will not argue additionally herein. However, Appellant will point out that *Jenkins v. Mayflower, supra,* and the additional case cited by Appellee in its brief at page 19, *Wildman v. Government Employees' Ins. Co.,* 48 Cal.2d 31, 307 P.2d 359 are both cases concerned with "Owners" insurance policies.

Appellee requests this Court to "rewrite" the insurance policy in the instant case (Appellee's brief p. 19). What it is actually asking this Court to do is to judicially rewrite the Financial Responsibility Law of Arizona (A.R.S. § 28-1170). This request, of course, should not be granted.

CONCLUSIONS

In a collateral proceeding Appellee has attempted (and in the trial court succeeded) to convince this Court that the complaint in the instant case comes within the purview of *Jenkins v. Mayflower, supra.* In this regard Appellee contends (a) that the policy issued by the Appellant Travelers Insurance Company to its insured Colonial & Pacific Frigidways is or as Appellee would like to have it read an "owner's policy" and (b) even though it is a "non-owner's type policy" Appellee suggests that this Court rewrite the contract between the parties and if all that fails then Appellee contends (c) that it can re-litigate the issue of ownership in this case when that issue has already been determined and adjudicated in Cause No. 147641, *McElroy v. Trujeque and Jacobs,* Maricopa County Superior Court, Arizona. Appellee contended to the trial Judge that this was another *Jenkins* situation. When the trial court rendered judgment in favor of Appellee it must have been persuaded by Appellee's reference to *Jenkins.*

It is respectfully submitted for the reasons set forth in the opening brief of Appellant supplemented by this reply brief that this Court should reverse the judgment of the trial court and direct the granting of Travelers' motion for summary judgment.

Respectfully submitted,

KRAMER, ROCHE, BURCH & STREICH
By DANIEL CRACCHIOLO
567 First National Bank Bldg.
Phoenix, Arizona
Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DANIEL CRACCHIOLO